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Ravi a/l Ratnam v Ghandi Rajan a/l Arjunun & Ors

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HIGH COURT (SHAH ALAM) — CIVIL SUIT NO BA-22NCvC-738-12
OF 2017
WONG KIAN KHEONG J
14 OCTOBER 2019

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Contract Law — Agreement — Sale and purchase agreement — Whether registered charge of land under National Land Code owed duty of care to cash purchaser of land in respect of discharge — Whether plaintiff's loss caused by refusal of first and second defendant to complete agreement or by fifth defendant's caveat or fourth's defendant's breach — Whether transaction between plaintiff and

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first and second defendants genuine sale and purchase agreement of land or unlicensed moneylending transaction — Whether unreasonable compensation provided to plaintiff meant s 75 of the Contracts Act 1950 applied — Whether court had discretion to award different sums of getting up between plaintiff and defendants

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The first and second defendants were registered and beneficial proprietors of a piece of land held under Title No 142638, Lot 33157, Pekan Sungai Gadut, Sembilan District, Negeri Sembilan, a bungalow was also erected on the land ('the property'). The first and second defendant had registered a charge under

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the National Land Code in favour of the defendant bank ('the fourth defendant'). The plaintiff entered into a sale and purchase agreement ('the agreement') dated 2 December 2013 with the first and second defendants wherein the first and second defendants agreed to sell the property to the plaintiff for RM250,000. The agreement was prepared by the third defendant

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who was then a practicing advocate and solicitor. The third defendant also acted for the plaintiff in respect of the discharge of charge. The plaintiff had paid the price in full to the first defendant but the first and the second defendant refused to complete the agreement and register the land in the name of the plaintiff. The first and the second defendant claimed that the plaintiff

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was an unlicensed moneylender who had lent money to the first defendant with interest. The first and second defendants had alleged that the agreement was in fact an unlicensed moneylending transaction which was prohibited by the Moneylenders Act 1951 ('the MA 1951'). The plaintiff filed this suit claiming, inter alia: (a) an order for specific performance of the agreement

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against the first and second defendant; (b) damages from the first and second defendant, based on cl 8.1 of the agreement; (c) the third defendant was negligent in respect of the agreement and discharge; (d) the fourth defendant was negligent in respect of the discharge and caused loss to the plaintiff; (e) the fifth defendant had wrongfully entered a private caveat over the land which was

detrimental to the plaintiff. The first and second defendant in turn, counterclaimed for, among others a declaration that the agreement was illegal and void for contravening the MA 1951. The issues by the plaintiff were: (a) whether the fourth defendant, a registered charge of the land under the National Land Code owed a duty of care to the plaintiff, a cash purchaser of the land in respect of the discharge; (b) whether the plaintiff's loss was caused by the refusal of the first and second defendant to complete the agreement or by the fifth defendant's caveat or the fourth's defendant's breach; (c) whether the transaction between the plaintiff and the first and second defendants was a genuine sale and purchase agreement of the property or an unlicensed moneylending transaction; (d) whether s 75 of the Contracts Act 1950 applied to 'unreasonable compensation' in cl 8.1 of the agreement ; and (e) whether the court had a discretion under O 59 rr 2(2) and 19(1) of the Rules of Court ('the ROC') to award different sums of getting up between the plaintiff and the defendants.

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Held:

- (1) The court found that the fourth defendants' witnesses were credible as their testimonies were supported by contemporaneous documentary evidence and there was no reason to doubt their cross-examination. The court also found that the first and second defendants were 'economical with the truth'. Based on their qualifications, they were not gullible and were well aware of their rights and remedies under the law (see paras 15–17).
- (2) Notwithstanding the fact that the plaintiff had paid the price in full to the first and second defendants, the fourth defendant as a registered chargee of the land owed no duty of care to the plaintiff regarding the discharge. There was no sufficient legal proximity between the plaintiff and the fourth defendant in the sense that it was not reasonably foreseeable that the plaintiff would suffer loss or damage arising from the fourth defendant's act, omission and delay in effecting the discharge (see para 21).
- (3) Even if it was assumed that the fourth defendant owed a duty of care to the plaintiff regarding the discharge, the court was not satisfied that the plaintiff had proven on a balance of probabilities that the fourth defendant had breached its duty of care owed to the plaintiff (see para 22).
- (4) The plaintiff could only claim for damages from the fourth defendant for the tort of negligence if the plaintiff's loss was 'caused' by the fourth defendant's breach of duty of care owed to the plaintiff. Applying the but for test, the plaintiff's loss was not caused by the fourth defendant or by any act, omission or delay by the fourth defendant's solicitor but due to the refusal of the first and second defendants to complete the agreement

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- A on the ground that there had been a breach of the Moneylending Act; and due to the fifth defendant's caveat (see paras 23–24).
- (5) The sale and purchase agreement was genuine and the plaintiff had paid the price in full to the first and second defendants. The allegation by the first and second defendant that the sale and purchase agreement was a camouflage of an unlicensed moneylending transaction which contravened the Moneylending Act was rejected. The first and second defendants could not rely on s 10OA of the MA because the first and second defendants failed to prove that the plaintiff has given a single loan with interest to the first and second defendants. There were sufficient evidence and reasons to rebut on a balance of probabilities the presumption that the plaintiff had carried on the business of moneylending under s 10OA of the MA (see paras 28–29).
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- D (6) The plaintiff was entitled to receive from the first and second defendant interest at the rate of 8%pa calculated on a daily basis on the balance purchase price irrespective of whether actual damage or loss to the plaintiff was proven or not by the plaintiff. In deciding what amounted to reasonable compensation or unreasonable compensation for the plaintiff arising from the breach, the concepts of legitimate interest and proportionality were considered. The first and second defendants succeeded to discharge the onus to satisfy that the 8%pa daily interest stipulated was within s 75 of the Contracts Act 1950 (see paras 32–33).
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- F (7) The court has a wide discretion under O 59 rr 2(2) and 19(1) of the ROC to award costs. The plaintiff shall pay costs of the original action to the fourth defendant and the first and second defendants shall pay costs to the plaintiff. All the out of pocket expenses claimed by the plaintiff and the fourth defendant are allowed in respect of costs. Regarding the getting up, the plaintiff shall pay in the amount of RM15,000 to the fourth defendant and a sum of RM60,000 shall be paid by the first and second defendants to the plaintiff (see paras 37–39).
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[Bahasa Malaysia summary]

- H Defendan pertama dan defendan kedua adalah pemilik berdaftar dan benefisiari kepada sebuah tanah di bawah Title No 142638, Lot 33157, Pekan Sungai Gadut, Daerah Sembilan, Negeri Sembilan dan sebuah banglo telah dibina di atas tanah tersebut ('bangunan'). Defendan pertama dan defendan kedua telah mendaftar gadaian di bawah Kanun Tanah Negara untuk bank defendan ('defendan keempat'). Plaintiff telah memasuki perjanjian jual beli ('perjanjian') bertarikh 2 Disember 2013 bersama defendan pertama dan defendan kedua di mana defendan pertama dan defendan kedua telah bersetuju untuk menjual bangunan tersebut untuk RM250,000. Perjanjian tersebut telah disediakan oleh defendan ketiga yang merupakan seorang pengamal peguamcara dan peguambela. Defendan ketiga juga mewakili
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plaintif untuk perlepasan gadaian. Plaintif telah membayar bayaran penuh kepada defendan pertama tetapi defendan pertama dan defendan kedua enggan untuk menyempurnakan perjanjian tersebut dan mendaftar tanah tersebut di atas nama plaintif. Defendan pertama dan defendan kedua telah mendakwa bahawa plaintif merupakan pemberi pinjam wang yang tanpa lesen dan telah memberi pinjam wang kepada defendan pertama berserta faedah. Defendan pertama dan defendan kedua telah mendakwa bahawa perjanjian tersebut adalah transaksi pemberian pinjaman wang yang tidak dibenarkan di bawah Akta Pemberi Pinjam Wang 1951 ('akta'). Plaintif telah memfailkan saman dan menuntut, antara lain; (a) perintah untuk pelaksanaan spesifik perjanjian tersebut terhadap defendan pertama dan kedua; (b) ganti rugi untuk defendan pertama dan kedua berdasarkan klausa 8.1 perjanjian tersebut; (c) defendan ketiga telah cuai di dalam perjanjian tersebut dan perlepasan gadaian; (d) defendan keempat telah cuai di dalam perlepasan gadaian dan telah membuat kerugian terhadap plaintif; (e) defendan kelima telah dengan salah memasukkan kaveat persendirian ke atas tanah tersebut yang mendatangkan kerugian kepada plaintif. Defendan pertama dan defendan kedua telah membuat tuntutan balas bahawa, antara lain, satu pengisytiharaan bahawa perjanjian tersebut adalah tidak sah dan terbatal kerana bercanggah dengan akta tersebut. Isu-isu yang telah dibawa oleh plaintif adalah; (i) samada defendan keempat, penerima gadai yang berdaftar ke atas tanah tersebut mempunyai kewajipan berjaga-jaga terhadap plaintif untuk perlepasan gadaian yang merupakan pembeli tunai tanah tersebut; (ii) sama ada kerugian plaintif disebabkan keengganan defendan pertama dan defendan kedua untuk menyempurnakan perjanjian tersebut atau kaveat persendirian defendan kelima atau pelanggaran oleh defendan keempat; (iii) samada transaksi di antara plaintif dan defendan pertama dan defendan kedua adalah perjanjian jual beli yang benar untuk bangunan tersebut atau transaksi beri pinjam wang tanpa berlesen; (iv) samada s 75 Akta Kontrak 1950 digunapakai untuk ganti rugi tidak munasabah di bawah klausa 8.1 perjanjian tersebut; dan (v) samada mahkamah mempunyai budi bicara di bawah A 59 k 2(2) dan 19(1) Kaedah-Kaedah Mahkamah 2012 ('KKM') untuk memberikan jumlah yang berlainan untuk getting up di antara plaintif dan defendan-defendan.

Diputuskan:

- (1) Mahkamah mendapati bahawa saksi defendan keempat boleh dipercayai kerana keterangan mereka disokong oleh bukti dokumen-dokumen yang berkaitan dan tiada sebab untuk meragui soal balas mereka. Mahkamah juga mendapati defendan pertama dan kedua adalah 'hemat dengan kebenaran'. Berdasarkan kelayakan mereka, mereka bukanlah mudah tertipu dan sedar akan hak-hak mereka dan remedi mereka (lihat perenggan 15–17).
- (2) Walaupun plaintif telah membayar bayaran secara penuh kepada defendan pertama dan defendan kedua, defendan keempat sebagai

- A penerima gadaian berdaftar terhadap tanah tersebut tidak mempunyai kewajiban berjaga-jaga terhadap plaintif untuk perlepasan gadaian. Tiada *proximity*/perhubungan undang-undang dikaitkan di antara plaintif dan defendan keempat dan ianya kelihatan tidak memadai untuk plaintif mengalami kerugian akibat daripada perlakuan, pengabaian atau kelewatan dalam pendaftaran perlepasan gadaian oleh defendan keempat (lihat perenggan 21).
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- C (3) Walaupun sekiranya beranggapan bahawa defendan keempat mempunyai kewajiban berjaga-jaga terhadap plaintif berkenaan dengan perlepasan gadaian, mahkamah tidak mendapati bahawa plaintif telah membuktikan keseimbangan kebarangkalian yang menunjukkan defendan keempat telah melanggar kewajiban berjaga-jaga terhadap plaintif (lihat perenggan 22).
- D (4) Plaintif hanya boleh menuntut ganti rugi daripada defendan keempat untuk kecuaiannya sekiranya kerugian plaintif 'disebabkan' oleh defendan keempat memungkiri kewajiban berjaga-jaga terhadap plaintif. Menggunakan ujian *but for*, kerugian plaintif tidaklah disebabkan oleh defendan keempat atau perbuatan, pengabaian atau kelewatan oleh
- E peguam defendan keempat tetapi kerana keengganan defendan pertama dan defendan kedua untuk menyempurnakan perjanjian tersebut atas alasan bahawa terdapat pelanggaran akta tersebut dan kaveat oleh defendan kelima (lihat perenggan 23–24).
- F (5) Perjanjian jual beli adalah benar dan plaintif telah membayar kesemua harga belian terhadap defendan pertama dan kedua. Dakwaan oleh defendan pertama dan defendan kedua bahawa perjanjian jual beli adalah samara untuk beri pinjam tanpa lesen yang bertentangan dengan akta tersebut adalah ditolak. Defendan pertama dan defendan kedua tidak boleh menggunakan s 10OA akta tersebut kerana defendan pertama dan kedua gagal untuk membuktikan plaintif telah memberikan satu pinjaman berserta faedah kepada defendan pertama dan kedua. Terdapat bukti yang mencukupi dan alasan untuk menolak keseimbangan kebarangkalian bahawa plaintif telah menjalankan perniagaan beri pinjaman di bawah s 10OA akta tersebut (lihat perenggan 28–29)
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- I (6) Plaintif berhak untuk menerima faedah daripada defendan pertama dan defendan kedua pada kadar tahunan 8% dikira mengikut dasar harian terhadap baki harga belian tidak kira samada kerugian sebenar terhadap plaintif adalah dibuktikan atau tidak oleh plaintif. Dalam menentukan jumlah yang bersesuaian ganti rugi atau ganti rugi yang tidak munasabah untuk plaintif berpunca daripada pelanggaran, konsep hak yang sah dan mengikut keadaan telah dipertimbangkan. Defendan pertama dan defendan kedua telah berjaya untuk melepaskan tanggungjawab untuk membuktikan bahawa kadar tahunan 8% dikira mengikut dasar harian

seperti termaktub dalam s 75 Akta Kontrak 1950 (lihat perenggan 32–33) A

- (7) Mahkamah mempunyai budi bicara yang luas di bawah A 59 k 2(2) dan 19(1) KKM untuk memberikan kos. Plaintiff perlu membayar kos kepada permohonan asal kepada defendan keempat dan defendan pertama dan defendan kedua perlu membayar kos kepada plaintiff. Segala perbelanjaan out of pocket yang di pohon oleh plaintiff dan defendan keempat adalah dibenarkan berkenaan dengan kos. Berkaitan dengan *getting up*, plaintiff perlu membayar RM15,000 kepada defendan keempat dan defendan pertama dan kedua perlu membayar RM60,000 kepada plaintiff (lihat perenggan 37–39).] B C

Cases referred to

- Asia File Products Sdn Bhd v Brilliant Achievement Sdn Bhd & Ors* [2019] MLJU 1342; [2019] 2 AMR 908, HC (refd) D
- Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd* [2019] 6 MLJ 15; [2019] 2 CLJ 723, FC (refd)
- De Tebrau Makmur Sdn Bhd & Anor v Bank Kerjasama Rakyat Malaysia Bhd* [2017] MLJU 201, HC (refd)
- Lok Kok Beng & 49 Ors v Loh Chiak Eong & Anor* [2015] 4 MLJ 734; [2015] 7 CLJ 1008, FC (refd) E
- Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229, FC (refd)
- Wong Thian Choy & Anor v Goodnite (M) Sdn Bhd & Anor* [2019] MLJU 1038; [2019] AMEJ 1098, HC (refd) F

Legislation referred to

- Contracts Act 1950 s 75
- Evidence Act 1950 s 8(2)
- Islamic Financial Services Act 2013
- Moneylenders Act 1951 ss 2, 5, 5(1), (2), 10OA, 15 G
- National Land Code ss 319(1)(a), 320(1)(a), 327(1), 329(1), Forms 14A, 16A, 16N, 117
- Rules of Court 2012 O 59 rr 2(2), 16(1)(e), (1)(f), 19(1) H
- David Charles (Nur Ashikin Alex & Rakan-Rakan) for the plaintiff.*
- George Proctor (Tee Wei Fong with him) (YS Woo & Proctor) for the first and second defendants*
- Nor Hafeez bin Nurul Hadi (Lum Seng Foo with him) (Khalek Awang & Assoc) for the fourth defendant.* I

A Wong Kian Kheong J:**A BACKGROUND**

- B** [1] The first and second defendants ('the first defendant' and 'the second defendant') are the registered and beneficial co-proprietors of a piece of land held under Title No 142638, Lot 33157, Pekan Sungai Gadut, Sembilan District, Senawang, Negeri Sembilan ('land'). A bungalow is erected on the land ('bungalow'). The first and second defendants are married to each other.
- C** [2] The first and second defendants had registered a charge under the National Land Code ('the NLC') over the land ('charge') in favour of the fourth defendant bank ('the fourth defendant') which is licensed under the Islamic Financial Services Act 2013.
- D** [3] The fifth defendant ('the fifth defendant') is the first defendant's younger brother.
- E** [4] The plaintiff ('the plaintiff') entered into a sale and purchase agreement dated 2 December 2013 with the first and second defendants ('SPA') wherein the first and second defendants agreed to sell the land together with the bungalow ('property') to the plaintiff at a price of RM250,000 ('price').
- F** [5] The SPA was prepared by the third defendant ('the third defendant') who was then a practicing advocate and solicitor ('A&S'). The third defendant also acted for the plaintiff in respect of the discharge of the charge under the NLC ('discharge').
- G** [6] The plaintiff had paid the price in full to the first defendant but the first and second defendants refused to complete the SPA and register the land in the name of the plaintiff. The first and second defendants claimed that the plaintiff was an unlicensed moneylender who had lent money to the first defendant with interest. Hence, the first and second defendants have alleged that the SPA is in fact an unlicensed moneylending transaction which is prohibited by the Moneylenders Act 1951 ('the MA').
- H**
- [7] In this case:
- I** (a) the plaintiff filed this suit ('original action') against the five defendants and claimed as follows, among others:
- (i) an order for specific performance of the SPA against the first and second defendants ('SP order');
 - (ii) the plaintiff has claimed damages from the first and second

- defendants by relying on, among others, section 8.1 SPA ('cl 8.1') which provides that if the first and second defendants fail to deliver vacant possession ('VP') of the property within seven days after the payment in full of the Price, the first and second defendants shall pay to the plaintiff interest at the rate of 8%pa to be calculated on a daily basis on the '*Balance Purchase Price*', ie RM220,000 (as defined in section 2.1 read with section 5 of the Second Schedule to the SPA) ('balance purchase price'); A
- (iii) the third defendant had committed the tort of negligence in respect of the SPA and discharge; B
- (iv) the fourth defendant was negligent in respect of the discharge and this had caused loss to the plaintiff; and C
- (v) on 10 April 2014, the fifth defendant had wrongfully entered a private caveat over the land ('fifth defendant's caveat') to the detriment of the plaintiff; and D
- (b) the first and second defendants counterclaimed for, among others, a declaration that the SPA is illegal and void for contravening MA ('counterclaim (first and second defendants)'). E
- [8] The plaintiff had entered judgments in default of appearance against the third and fifth defendants.
- [9] The original action and counterclaim (first and second defendants) were heard together. F
- B. ISSUES
- [10] The following questions arise in this case: G
- (a) does the fourth defendant, a registered chargee of the land under NLC, owe a duty of care to the plaintiff, a cash purchaser of the land, in respect of the discharge? This is a novel issue; H
- (b) assuming that: I
- (i) the fourth defendant owes a duty of care to the plaintiff regarding the discharge; and
- (ii) the fourth defendant has breached its duty of care owed to the plaintiff ('fourth defendant's breach') was the plaintiff's loss 'caused' in fact by:
- (i) the refusal of the first and second defendants to complete the SPA;
- (ii) the fifth defendant's caveat; or

- A** (iii) the fourth defendant's breach?;
- (c) whether the transaction between the plaintiff on the one part and the first and second defendants on the other part was:
- B** (i) a genuine SPA of the land; or
- (ii) an unlicensed moneylending transaction prohibited by s 15 of the MA;
- (d) does cl 8.1 provide 'unreasonable compensation' to the plaintiff which attracts the application of s 75 of the Contracts Act 1950 ('the CA')?; and
- C** (e) whether the court has a discretion under O 59 rr 2(2) and 19(1) of the Rules of Court 2012 ('the RC') to award different sums of 'Getting Up' between:
- D** (f) the plaintiff and fourth defendant; and
- (g) the plaintiff on the one part and the first and second defendants on the other part.

C. THE PLAINTIFF'S CASE

- E** [11] The plaintiff gave the following evidence, among others:
- (a) the plaintiff is a director in an advertising company, Avis Vision (M) Sdn Bhd ('AVSB');
- F** (b) the plaintiff has never been involved in any moneylending business, whether licensed or otherwise;
- (c) around November 2013, the third defendant informed the plaintiff that the first and second defendants wanted to sell urgently the property. The following day, the plaintiff met the first defendant in the third defendant's law office ('meeting');
- G** (d) at the meeting:
- (i) the third defendant introduced the first defendant to the plaintiff;
- H** (ii) the first defendant gave a business card to the plaintiff ('first defendant's business card'). According to the first defendant's business card, the first defendant has a 'Dato' Seri' title and is the Chairman of 'Ghama Medic'. The first defendant's business card had been adduced by the plaintiff as evidence in this case; and
- I** (iii) the first defendant informed the plaintiff as follows:
- (1) the first and second defendants are the registered co- proprietors of the property. A copy of the issue document of title of the land ('IDT') was shown to the plaintiff;

- (2) the loan taken by the first and second defendants from the fourth defendant for the purchase of the property ('loan'), had been fully settled; and A
- (3) colour photographs of the exterior and interior of the property ('photographs') were shown to the plaintiff; and B
- (e) two or three days after the meeting, the first defendant's driver took the plaintiff to view the 'property' externally. The plaintiff alleged that after the execution of the SPA, he found out that he was actually shown a bungalow adjoining the property ('neighbouring property') and not the property itself; C
- (f) the plaintiff signed the following documents:
 - (i) the SPA;
 - (ii) 'CKHT' form regarding Real Property Gains Tax ('CKHT Form'); and D
 - (iii) the NLC form to enter a private caveat over the land ('plaintiff's caveat');
- (g) the first and second defendants: E
 - (i) signed the SPA and initialed on all the pages in the SPA; and
 - (ii) executed the NLC Form to transfer the land ('Form 14A');
- (h) regarding the price: F
 - (i) the plaintiff paid a deposit sum of RM30,000 in cash to the first defendant ('deposit'); and
 - (ii) the balance purchase price was paid by the plaintiff to the first defendant by way of a bank's cashier's order ('cashier's order'). A copy of the cashier's order has been tendered as evidence in this action; G
- (i) after the execution of the SPA, the plaintiff discovered that the photographs showed the neighbouring property and the property itself. Upon entering the property, the plaintiff found out that the property had not been completely built and was in a dilapidated state. H

The plaintiff complained about the property's state of disrepair and the first defendant agreed to pay a sum of RM25,000 to the plaintiff so as to enable the plaintiff to proceed with the SPA. Subsequently, the first defendant paid a sum of RM15,000 to the plaintiff by way of the first defendant's personal cheque dated 2 February 2014 ('first defendant's first cheque'). The first defendant's first cheque was however dishonoured. The first defendant issued a second cheque on 5 February I

- A** 2014 for RM15,000 in favour of the plaintiff which was honoured ('first defendant's second cheque'). The first defendant did not pay the balance of RM10,000 to the plaintiff;
- B** (j) regarding the transfer of the title to the land from the first and second defendants to the plaintiff, the plaintiff had paid RM6,000 as stamp duty and RM600 as penalty for late payment of stamp duty ('plaintiff's payment of stamp duty and penalty');
- C** (k) the fourth defendant's solicitors, Messrs Khamdan & Co ('fourth defendant's solicitors') had 'negligently' delivered, among others, the IDT, registered charge instrument (Form 16A) and executed discharge of charge instrument (Form 16N) to Mr Karthikesan A/L Murugasoo, a representative of the first and second defendants. The fourth defendant's solicitors should have handed the IDT, Forms 16A and 16N to the plaintiff's solicitors because the plaintiff had paid the price in full to the first and second defendants; and
- D** (l) the plaintiff's solicitors sent the following two letters to the first and second defendants:
- E** (i) a letter dated 1 March 2017 which requested the first and second defendants to forward Form 16A to the plaintiff's solicitors (first letter (plaintiff's solicitors)); and
- (ii) a letter dated 22 March 2017 (second letter (plaintiff's solicitors)) which informed the first and second defendants that if the plaintiff's solicitors did not receive Form 16A within seven days from the date of the second letter ('plaintiff's solicitors'), the plaintiff's solicitors had instruction from the plaintiff to take legal action against the first and second defendants.
- F**
- G** D. CASE FOR THE FIRST AND SECOND DEFENDANTS
- [12]** The first and second defendants testified as follows, among others:
- H** (a) the first and second defendants purchased the land from a developer for RM143,425. For this purchase, the first and second defendants took the loan from the fourth defendant. The first and second defendants had repaid the loan in full to the fourth defendant;
- (b) a contractor was appointed by the first and second defendants to build the bungalow for RM144,700;
- I** (c) the first and second defendants did extensions to the bungalow at a cost of RM30,000;
- (d) the first and second defendants had been informed that the property was worth at least RM500,000 in 2013; and

- (e) the first and second defendants did not sell the property to the plaintiff at the price. Instead, the first and second defendants alleged as follows: **A**
- (i) the first defendant runs five clinics in Selangor ('five clinics'). The first defendant needed RM250,000 for his medical practice; **B**
 - (ii) the first defendant had been introduced to the plaintiff by two 'brokers', Samy ('broker Samy') and VS Palani (known as Dominic); **C**
 - (iii) the plaintiff and third defendant informed the first and second defendants that the plaintiff was an unlicensed moneylender; **D**
 - (iv) the plaintiff lent RM250,000 to the first and second defendants ('alleged loan') on the following conditions: **E**
 - (1) for the alleged loan, the first and second defendants would pay interest to the plaintiff at the rate of 6% per month, namely RM15,000 per month; and **F**
 - (2) the first and second defendants must execute the SPA which would be prepared by the plaintiff's solicitor, the third defendant; **G**
 - (v) the plaintiff only lent RM220,000 to the first and second defendants. The deposit was not paid by the plaintiff to the first and second defendants. Instead, for the alleged loan, the plaintiff deducted upfront two months of interest amounting to RM30,000; **F**
 - (vi) the first and second defendants paid RM7,500 to Broker Samy as commission for arranging the alleged loan; and **G**
 - (vii) the first defendant paid only one or two months of interest because he did not have any money to pay the monthly interest to the plaintiff. Hence, the dishonoured first defendant's first cheque. **G**

E. THE FOURTH DEFENDANT'S CASE

[13] The following two witnesses gave evidence in favour of the fourth defendant in this case: **H**

- (a) Puan Salelah bt Sirat ('SD2'), the fourth defendant's Assistant Manager in the Credit Administration Department; and
- (b) Encik Sapruddin bin Hatibe ('SD3'), a practicing A&S, who acted for the fourth defendant in respect of the discharge. **I**

[14] SD2 and SD3 testified that the fourth defendant had not been negligent in this case. Hence, the fourth defendant was not liable to the plaintiff in the original action.

A F. CREDIBILITY OF WITNESSES

[15] Firstly, I find that SD2 and SD3 are credible witnesses because:

- B**
- (a) the testimonies of SD2 and SD3 are supported by contemporaneous documentary evidence; and
 - (b) the cross-examination of SD2 and SD3 has not revealed any reason to doubt their veracity.

C [16] I find as a fact that the plaintiff is a truthful witness. This finding of fact is premised on the following evidence and reasons:

(1) the plaintiff's testimony is supported by the following documents:

- D**
- (a) the plaintiff has a successful advertising business through AVSB. The plaintiff has adduced the company profile of AVSB ('exh P1'). The first and second defendants have not adduced any evidence to prove that the contents of exh P1 are not true;
 - (b) the cashier's order;
 - E** (c) the SPA;
 - (d) Form 14A;
 - (e) CKHT Form; and
 - F** (f) upon the plaintiff's instruction, the first and second letters (plaintiff's solicitors) had been sent to the first and second defendants; and

G (2) the plaintiff's conduct is relevant under s 8(2) of the Evidence Act 1950 ('EA') — please see the judgment of Chang Min Tat FJ in the Federal Court case of *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229 at p 234. The following conduct by the plaintiff supports his credibility:

- (a) the plaintiff's payment of stamp duty and penalty;
- H** (b) the plaintiff paid commission amounting to RM10,000 to a broker in respect of the SPA;
- (c) the entry of the plaintiff's caveat; and
- I** (d) the plaintiff applied successfully to the High Court in Seremban to set aside the fifth defendant's caveat (removal order of fifth defendant's caveat).

[17] It is this court's finding of fact that the first and second defendants are economical with the truth because:

- (a) the first defendant is a qualified doctor and has practised medicine for many years. The first defendant owns five clinics and the second defendant runs the five clinics. The first and second defendants are not gullible and are well aware of their rights and remedies under the law; **A**
- (b) if the plaintiff was indeed an unlicensed moneylender: **B**
 - (i) the first and/or second defendants could have easily denied the first and second letters (plaintiff's solicitors). There was however no reply by the first and second defendants to the first and second letters (plaintiff's solicitors); **C**
 - (ii) the first and/or second defendants should have informed the fourth defendant and/or the fourth defendant's Solicitors that the plaintiff was an unlicensed moneylender and on that ground, Forms 16A and 16N should not be forwarded by the fourth defendant's solicitors to the plaintiff's solicitors; **D**
 - (iii) the first and/or second defendants could have lodged a police report against the plaintiff on the ground that the plaintiff had carried on business as an unlicensed moneylender. No such police report was lodged by the first and/or second defendants; **E**
 - (iv) the first and/or second defendants could have applied to the High Court to remove the plaintiff's caveat under s 327(1) of the NLC and upon the court's removal of the plaintiff's Caveat, the first and/or second defendants could have applied for the court pursuant to s 329(1) of the NLC to assess the loss and damage suffered by the first and/or second defendants as a result of the wrongful entry of the plaintiff's caveat; and **F**
 - (v) upon the removal order of fifth defendant's caveat, to prevent the registration of transfer of the land to the plaintiff, the first and/or second defendants could have applied to enter a registrar's caveat over the land under ss 319(1)(a) and 320(1)(a) of the NLC (to prevent 'improper dealing'); **G**
- (c) instead of waiting for the plaintiff to file the original action against the first and second defendants, the first and second defendants could have filed a suit to declare the SPA null and void on the ground that the alleged loan had contravened MLA; **H**
- (d) the first and second defendants had testified that the third defendant had abetted in the plaintiff's breach of MLA and yet, the first and second defendants did not cite the third defendant as a co-defendant in the counterclaim (first and second defendants); **I**
- (e) the first and second defendants had given evidence that they needed RM220,000 for the five clinics. No documentary evidence however was

- A adduced by the first and second defendants to prove that the sum of RM220,000 (allegedly lent by the plaintiff) was in fact used for the five clinics;
- B (f) the first and second defendants claimed that they had been informed that the property was worth at least RM500,000 in 2013. The first and second defendants did not produce any valuation of the property in 2013; and
- (g) first defendant's business card stated that the first defendant had been conferred a 'Dato' Seri' title. However, the first defendant's two witness statements referred to his title as 'Datuk' only. It is clear that the first defendant had been less than honest regarding his title.

G WHETHER THE FOURTH DEFENDANT OWES DUTY OF CARE TO PLAINTIFF

- D [18] For the fourth defendant to be liable in negligence to the plaintiff regarding the discharge, the plaintiff has the burden to prove the following three elements of the tort of negligence:
- E (a) the fourth defendant owes a duty under Malaysian case law to take all reasonable care in respect of the discharge so as not to cause any loss to the plaintiff, a cash purchaser of the land ('alleged duty');
- (b) if the alleged duty exists, the fourth defendant has breached such a duty; and
- F (c) the plaintiff's loss has been 'caused' in fact by the fourth defendant's breach and is not too remote to be recovered in law.

- G [19] I am not able to find a previous Malaysian case which has decided on the issue of whether a registered chargee of land under NLC owes a duty of care (in respect of the discharge of the NLC charge) to a purchaser of the land who has paid the full purchase price.

- H [20] In *De Tebrau Makmur Sdn Bhd & Anor v Bank Kerjasama Rakyat Malaysia Bhd* [2017] MLJU 201, at para 50, I have followed Zainun Ali FCJ's judgment in the Federal Court case of *Lok Kok Beng & 49 Ors v Loh Chiak Eong & Anor* [2015] 4 MLJ 734; [2015] 7 CLJ 1008, as follows:

[50] *My understanding of Lok Kok Beng is as follows:*

- I ...
- (2) *in deciding whether a party (X) owes a duty of care to another party (Y), the court shall consider the following —*
- (a) *whether there is 'sufficient legal proximity' between X and Y. It is to be noted that courts have also applied the test of whether it is reasonably foreseeable that*

Y will suffer loss or damage arising from X's misstatement. In this respect, the following considerations are relevant —

- (i) *the nature of relationship between X and Y;*
- (ii) *whether X has voluntarily assumed responsibility to Y regarding X's misstatement;*
- (iii) *whether Y has relied on X's misstatement;*
- (iv) *whether there is physical proximity;*
- (v) *whether there is circumstantial proximity; and*
- (vi) *whether there is causal proximity;*
- (b) *if there is 'sufficient legal proximity' between X and Y, X owes a prima facie duty of care to Y. The next question is whether X's prima facie duty of care is negated by policy consideration. The following matters are pertinent —*
 - (i) *the factual matrix of the case;*
 - (ii) *whether there is a contract between X and Y; and*
 - (iii) *the relative bargaining positions of X and Y; ... (Emphasis added.)*

[21] I am of the view that notwithstanding the fact that the plaintiff has paid the price in full to the first and second defendants, the fourth defendant (a registered NLC chargee of the land) owes no duty of care to the plaintiff regarding the discharge. This decision is based on the following evidence and reasons:

- (a) there is no 'sufficient legal proximity' between the plaintiff and fourth defendant in the sense that it is not reasonably foreseeable that the plaintiff will suffer loss or damage arising from the fourth defendant's act, omission and/or delay in effecting the discharge;
- (b) the fourth defendant has not voluntarily assumed any responsibility to the plaintiff in respect of the discharge; and
- (c) there is no:
 - (i) physical proximity
 - (ii) circumstantial proximity and
 - (iii) causal proximity
 between the plaintiff and fourth defendant in this case.

H DID FOURTH DEFENDANT BREACH DUTY OF CARE OWED TO PLAINTIFF?

[22] Even if it is assumed that the fourth defendant owes a duty of care to the plaintiff regarding the discharge, I am not satisfied that the plaintiff has proven

- A on a balance of probabilities that the fourth defendant has breached its duty of care owed to the plaintiff.

I. WHAT WAS 'CAUSE' OF PLAINTIFF'S LOSS?

- B [23] The plaintiff can only claim for damages from the fourth defendant for the tort of negligence if the plaintiff's loss is 'caused' by the fourth defendant's breach of its duty of care owed to the plaintiff. This concerns a question of causation which has been explained in *Asia File Products Sdn Bhd v Brilliant Achievement Sdn Bhd & Ors* [2019] MLJU 1342; [2019] 2 AMR 908, at para 22, as follows:

[22] *Regarding the issue of causation of loss or damage, I am of the following view:*

- (1) in *Gerber Garment Technology*, at p 452, *Staughton LJ* decided that a patent owner can only claim for a loss or damage:
- D (a) *which would not have occurred 'but for' the patent infringement; and*
- (b) *where as a matter of common sense, the patent infringement is the 'cause' of the loss or damage; and*
- E (2) *previous cases on causation regarding patent infringement, as for all other causes of action, depend on their particular facts. Accordingly, previous judgments on causation of loss or damage arising from patent infringement, cannot constitute binding legal precedents from the view point of the stare decisis doctrine.* (Emphasis added.)

- F [24] Applying the 'but for' test, the plaintiff's loss was not caused by the fourth defendant or by any act, omission and/or delay by the fourth defendant's Solicitors. Instead, the plaintiff's loss would not have occurred 'but for':

- (1) the refusal of the first and second defendants to complete the SPA on the ground that there had been a breach of MA; and
- G (2) the fifth defendant's caveat (which was entered on 10 April 2014 and was only removed on 4 October 2016 pursuant to the removal order of fifth defendant's caveat).

- H [25] Applying common sense, it is clear that the two 'effective' causes, 'real' causes or *causa causans* of the plaintiff's loss have been explained in the above sub-paras 24(1) and (2).

I J. WHETHER PLAINTIFF WAS AN UNLICENSED MONEYLENDER WHO HAD LENT MONEY WITH INTEREST TO FIRST AND SECOND DEFENDANTS

[26] The Long Title, definition of 'moneylender' in s 2 of the MA, ss 5, 10OA and 15 of the MA provide as follows:

- Long Title* — ‘An Act for the regulation and control of the business of moneylending, the protection of borrowers of the monies lent in the course of such business, and matters connected therewith. A
- s 2
- ‘moneylender’ means any person who carries on or advertises or announces himself or holds himself out in any way as carrying on the business of moneylending, whether or not he carries on any other business; B
- ‘5 Licences to be taken out by moneylender
- (1) No person shall carry on or advertise or announce himself or hold himself out in any way as carrying on the business of moneylending unless he is licensed under this Act. C
- (2) Any person who carry on or advertise or announce himself or hold himself out in any way as carrying on the business of moneylending without a valid licence, or who continues to carry on such business after his licence has expired or been suspended or revoked shall be guilty of an offence under this Act and shall be liable to a fine of not less than two hundred and fifty thousand ringgit but not more than one million ringgit or to imprisonment for a term not exceeding five years or to both, and in the case of a second or subsequent offence shall also be liable to whipping in addition to such punishment. D
- 100A Presumption as to the business of moneylending E
- Where in any proceedings against any person, it is alleged that such person is a moneylender, the proof of a single loan at interest made by such person shall raise a presumption that such person is carrying on the business of moneylending, until the contrary is proved. F
- 15 Contract by unlicensed moneylender unenforceable
- No moneylending agreement in respect of money lent after the coming into force of [MA] by an unlicensed moneylender shall be enforceable. (Emphasis added.) G
- [27] It is decided in *Wong Thian Choy & Anor v Goodnite (M) Sdn Bhd & Anor* [2019] MLJU 1038; [2019] AMEJ 1098, at paras 34 and 36, as follows:
- [34] The MA has been substantially amended as follows:
- (1) *Moneylenders (Amendment) Act 2003 (Act A1193)* has, among others — H
- (a) introduced a new long title to MA (Long Title);
- (b) introduced a new s 5 MA; and
- (c) amended s 15 MA. I
- Act A1193 came into effect on 1.11.2003; and*
- (2) *Moneylenders (Amendment) Act 2011 (Act A1390)* has, among others —
- (a) provided a new definition of ‘moneylender’ in s 2 MA;
- (b) amended s 5 MA; and

- A (c) introduced a new s 10OA MA.
Act A1390 is enforced with effect from 15 April 2011.
...
- B [36] Firstly, I opine that cases decided regarding MA before the enforcement of A1193 and A1390, should be read with caution. It is decided in *Barisan Tenaga Perancang (M) Sdn Bhd v Dr Mansur bin Hussain & Ors* [2017] 2 MLRH 177, at [48], as follows:
[48] I am of the following view regarding MA:
- C (1) the title to MA and the above provisions in MA show Parliament's intention for MA to regulate the business of moneylending and not to regulate all kinds of moneylending transactions. Section 5(1) and (2) MA prohibit unlicensed moneylending business and certain acts related thereto. MA does not prohibit any moneylending transaction with interest unless the lender has carried on an unlicensed moneylending business;
- D (2) s 10OA MA provides that in any proceedings against any person where it is alleged that such person is a moneylender, proof of a single loan at interest made by such person shall raise a rebuttable presumption that such person is carrying on the business of moneylending. Even if a presumption arises under s 10OA MA against a certain party, that party may adduce evidence to rebut this presumption by proving that the party is not carrying on moneylending business. A party is only required to adduce evidence on a balance of probabilities to rebut a statutory presumption - please see the Supreme Court's judgment delivered by Wan Suleiman SCJ in *Akin Khan bin Abdul Rahman v Public Prosecutor* [1987] 2 MLJ 217 at 218–219; and
- E (3) s 15 MA applies only to a moneylending agreement by an unlicensed moneylender who is carrying on business of moneylending. This is because of the definition of 'moneylender' in s 2 MA. (Emphasis added.)
- F
- G The High Court's decision in *Barisan Tenaga Perancang* has been affirmed by the Court of Appeal in a judgment given by Abang Iskandar Abang Hashim JCA (as he then was) in *Dr Mansur bin Hussain & Ors v Barisan Tenaga Perancang (M) Sdn Bhd* [2019] 1 LNS 661. (Emphasis added.)
- H [28] I find as a fact that the SPA is genuine and the plaintiff has paid the price in full to the first and second defendants. These findings of fact are premised on the following evidence and reasons:
- I (a) the plaintiff is a genuine businessman who is a director in a successful advertising company, AVSB. This is clear from exh P1;
(b) the first and second defendants did not adduce any evidence to prove that the plaintiff had carried on, advertised, announced himself or held himself out in any way as carrying on the business of moneylending within the meaning of s 5(1) of the MA;
(c) the plaintiff has signed on various documents as stated in the above sub-paras 16(1)(c) to (e). The plaintiff has also taken part and instructed

on the execution of matters explained in the above sub-paras 16(1)(b), (f) and (2)(a) to (d). It is highly unlikely for an unlicensed moneylender to leave a paper trail which can expose the identity of the unlicensed moneylender;

A

(d) the plaintiff is a reliable witness — please see the above para 16; and

B

(e) the first and second defendants lack credibility — please refer to the above para 17.

I have no hesitation to reject the allegation by the first and second defendants that the SPA is a camouflage of an unlicensed moneylending transaction which has contravened MA.

C

[29] I am of the view that the first and second defendants cannot rely on s 10OA of the MA because the first and second defendants have failed to prove that the plaintiff has given a single loan with interest to the first and second defendants. In any event, the evidence and reasons stated in the above paras 16–17 and 28 are sufficient to rebut on a balance of probabilities the presumption that the plaintiff has carried on the business of moneylending under s 10OA of the MA.

D

E

K. DOES CLAUSE 8.1 ATTRACT APPLICATION OF SECTION 75 OF THE CA?

[30] Section 75 of the CA provides as follows:

F

Compensation for breach of contract where penalty stipulated for.

75. When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for. (Emphasis added.)

G

[31] In the Federal Court case of *Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd* [2019] 6 MLJ 15; [2019] 2 CLJ 723 at para 74, Richard Malanjum CJ (Sabah & Sarawak) (as he then was) has explained the scope of s 75 of the CA as follows:

H

[74] *In summary and for convenience, the principles that may be distilled from hereinabove are these:*

I

...

(iv) *In determining what amounts to ‘reasonable compensation’ under s 75 of the [CA],*

- A *the concepts of 'legitimate interest' and 'proportionality' as enunciated in Cavendish (supra) are relevant.*
- B *(v) A sum payable on breach of contract will be held to be unreasonable compensation if it is extravagant and unconscionable in amount in comparison with the highest conceivable loss which could possibly flow from the breach. In the absence of proper justification, there should not be a significant difference between the level of damages spelt out in the contract and the level of loss or damage which is likely to be suffered by the innocent party.*
- C *(vi) s 75 [CA] allows reasonable compensation to be awarded by the court irrespective of whether actual loss or damage is proven. Thus, proof of actual loss is not the sole conclusive determinant of reasonable compensation although evidence of that may be a useful starting point.*
- D *(vii) The initial onus lies on the party seeking to enforce a damages clause under s 75 [CA] to adduce evidence that firstly, there was a breach of contract and that secondly, the contract contains a clause specifying a sum to be paid upon breach. Once these two elements have been established, the innocent party is entitled to receive a sum not exceeding the amount stipulated in the contract irrespective of whether actual damage or loss is proven subject always to the defaulting party proving the unreasonableness of the damages clause including the sum stated therein, if any.*
- E *(viii) If there is a dispute as to what constitutes reasonable compensation, the burden of proof falls on the defaulting party to show that the damages clause including the sum stated therein is unreasonable. (Emphasis added.)*
- F [32] Based on *Cubic Electronics*, I decide as follows:
- G (1) the plaintiff has proven the following two matters:
- H (a) the first and second defendants had breached cl 8.1 when the first and second defendants did not deliver VP of the property within seven days after the plaintiff's payment of the price in full (*breach (first and second defendants)*); and
- I (b) the SPA contains cl 8.1 which names a sum to be paid by the first and second defendants to the plaintiff in the event of the breach (first and second defendants);
- (2) upon the plaintiff's proof of the two matters as stated in the above sub-para (1):
- (a) the plaintiff is entitled to receive from the first and second defendants 'interest' at the rate of 8%pa to be calculated on a daily basis on the balance purchase price (*8%pa daily interest*) irrespective of whether actual damage or loss to the plaintiff is proven or not by the plaintiff (plaintiff's entitlement); and
- (b) the plaintiff's entitlement is subject to the first and second

- defendants being able to prove that cl 8.1 provides ‘unreasonable compensation’; A
- (3) in deciding what amounts to ‘reasonable compensation’ or ‘unreasonable compensation’ for the plaintiff arising from the breach (first and second defendants), the court considers the two concepts of ‘legitimate interest’ and ‘proportionality’ (two concepts); and B
- (4) taking into account the two concepts and the fact that financial institutions do not impose 8%pa daily interest, the first and second defendants have succeeded to discharge the onus to satisfy this court that the 8%pa daily interest stipulated in cl 8.1: C
- (a) amounts to ‘unreasonable compensation’ and
- (b) is ‘extravagant and unconscionable in amount in comparison with the highest conceivable loss which could possibly flow from the (breach (first and second defendants))’ D
— within the meaning of s 75 of the CA.
- [33] As explained in the above para 32, in accordance with s 75 of the CA, I order the court registrar (registrar) to assess all loss suffered by the plaintiff due to the breach (first and second defendants) (assessment) and the sum assessed by the registrar shall not exceed the total amount stipulated in cl 8.1 (based on 8%pa daily interest). E
- L. COSTS F
- [34] O 59 rr 2(2) and 19(1) of the Rules of Court 2012 provide as follows:
- O 59 r 2(2) Subject to the express provisions of any written law and of these Rules, the costs of and incidental to proceedings in the Court, shall be in the discretion of the Court, and the Court shall have full power to determine by whom and to what extent the costs are to be paid.* G
- The amount of costs (excluding disbursement) that are payable shall be at the discretion of the Court and shall be determined upon the conclusion of the trial.* (Emphasis added.) H
- [35] The court has a wide discretion under O 59 rr 2(2) and 19(1) of the RC to award costs — please see *De Tebrau Makmur* at para [67].
- [36] The award of costs concerns the following two components: I
- (a) getting up; and
- (b) ‘Out of Pocket Expenses’ (‘OPE’)
— please see Form 117 in Appendix A to RC.

- A** [37] In view of the above judgment, I award costs in this case as follows:
- (a) the plaintiff shall pay costs of the Original A to the fourth defendant ('costs (fourth defendant)'); and
- B** (b) the first and second defendants shall pay costs to the plaintiff ('costs (plaintiff)').
- [38] All the OPE claimed by the plaintiff and fourth defendant are allowed in respect of costs (plaintiff) and costs (fourth defendant) respectively.
- C** [39] Regarding getting up, I exercise my discretion pursuant to O 59 rr 2(2) and 19(1) of the RC as follows:
- (a) the plaintiff shall pay getting up in the amount of RM15,000 to the fourth defendant; and
- D** (b) getting up in a sum of RM60,000 shall be paid by the first and second defendants to the plaintiff.
- E** [40] The reasons for the above exercise of discretion regarding getting up are as follows:
- (a) the first and second defendants, unlike the fourth defendant, has filed a counterclaim (first and second defendants);
- F** (b) the original action against the fourth defendant only concerns the fourth defendant's alleged negligence and if the plaintiff succeeds, the plaintiff is only entitled to monetary relief in the form of damages against the fourth defendant. The original action against the first and second defendants (original action (first and second defendants)) and the counterclaim (first and second defendants) however involve the plaintiff's right to the property. If this court has dismissed the original action (first and second defendants) and if the counterclaim (first and second defendants) is allowed, the plaintiff will be deprived of the property. Hence, the original action (first and second defendants) and the counterclaim (first and second defendants) are very important to the plaintiff within the meaning of O 59 r 16(1)(e) of the RC;
- G**
- H**
- I** (c) there is a second reason why the original action (first and second defendants) and the counterclaim (first and second defendants) are crucial to the plaintiff — if this court finds that the plaintiff has carried on moneylending business without a valid license, he may be charged with an offence under s 5(2) of the MA which imposes the following punishment for a first offender:
- (i) a maximum imprisonment of five years; and/or

- (ii) a minimum fine of RM250,000 and a maximum fine of RM1m; and A
- (d) the plaintiff had paid RM250,000 for the property. The amount of money expended by the plaintiff is relevant under O 59 r 16(1)(f) of the RC in the court's assessment of getting up. B

M. COURT'S DECISION

[41] In summary:

- (a) despite the fact that the plaintiff had paid the price in full to the first and second defendants, the fourth defendant, a registered chargee of the land, owed no duty of care to the plaintiff regarding the discharge. In any event: C
 - (i) there is no proof that the fourth defendant has breached its duty of care owed to the plaintiff regarding the discharge; and D
 - (ii) the two effective causes of the plaintiff's loss are: E
 - (1) the refusal of the first and second defendants to complete the SPA; and
 - (2) the entry of the fifth defendant's caveat; F
- (b) the court finds that the SPA is genuine and the plaintiff has paid the price in full to the first and second defendants. There is no evidence to show that the SPA is an unlicensed moneylending transaction in breach of MA; G
- (c) the first and second defendants have succeeded to discharge the burden to show that the 8%pa daily interest stipulated in cl 8.1 amounts to 'unreasonable compensation' within the meaning of s 75 of the CA. Accordingly, the court orders an assessment to be conducted by the registrar; and H
- (d) in view of, among others, the importance of the property to the plaintiff and the possible penal sanctions against the plaintiff if the counterclaim (first and second defendants) is allowed, the court exercises its discretion under O 59 rr 2(2) and 19(1) of the RC to award a much higher getting up sum for the plaintiff (regarding the amount of costs (plaintiff)) as compared to the getting up for the fourth defendant (in respect of costs (fourth defendant)). I

[42] Premised on the above evidence and reasons:

- (a) the original action against the fourth defendant is dismissed with costs; and I
- (b) as between the plaintiff on the one part and the first and second defendants on the other part:

- A** (i) the original action is allowed with the following order, among others:
- (1) the court grants a SP order (to perform the SPA) in favour of the plaintiff against the first and second defendants;
- B** (2) the first and second defendants shall pay to the plaintiff special damages in the amount of RM7,467.90;
- (3) the registrar shall conduct the assessment and the amount of damages assessed at the assessment (assessed damages) shall not exceed the total amount stated in cl 8.1 (based on 8%pa daily interest); and
- C** (4) the first and second defendants shall pay to the plaintiff interest at the rate of 5%pa on the assessed damages from the date of the filing of the original action until the date of full payment of the assessed damages;
- (ii) the counterclaim (first and second defendants) is dismissed; and
- D** (iii) the first and second defendants shall pay costs (plaintiff) to the plaintiff.

E [43] I end with the reminder that the court should be vigilant of vendors of property who attempt to wriggle out of their contractual obligations to sell their property to genuine purchasers on the pretext that the sale contracts in question are unlicensed moneylending transactions.

Order accordingly.

F Reported by Mohd Kamarul Anwar

G

H

I